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Supreme Court of the United States

Supreme Court, U. S.
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October Term, 1978
No. .....

JOHN JOHNSON,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN T. CORRIGAN, *Prosecuting Attorney of Cuyahoga County, Ohio*

JAMES M. CAIN
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(216) 623-7800
Attorneys for Respondent

BERNARD A. BERKMAN
BERKMAN, GORDON, KANCELBAUM,
LEVY AND MURRAY
2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113
(216) 781-5245
Attorney for Petitioner

GEORGE W. PALDA
J. MICHAEL MURRAY
Of Counsel

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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To: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There is no substantial federal question which would require this Court to review this case.

The questions herein presented were raised in the trial court, the Court of Appeals for Cuyahoga County, Ohio, and the Supreme Court of Ohio. The jury in the trial court found the petitioner guilty of aggravated murder, kidnapping and rape. The Court of Appeals affirmed the judgment of conviction. The Supreme Court of Ohio dismissed the petitioner's appeal for the reason that no substantial constitutional question existed.

The Ohio courts decided this case in accordance with the statutes and Constitution of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is therefore presented by the petition for certiorari.

COUNTER QUESTIONS OF LAW

1. Absent a showing that pre-trial publicity "utterly corrupted" a defendant's opportunity for a fair trial or a showing from scrupulous voir dire examination that any specifically excludable information is set in the minds of the jurors chosen for the trial, the court need not continue the case or grant a change of venue.

2. Where there is no evidence of threat or coercion in obtaining consent to search an automobile, a consensual police search is not unreasonable under the Fourth and Fifth Amendments of the United States Constitution.

3. Where police officers have knowledge of facts and circumstances sufficient to establish probable cause to believe that petitioner has committed a felony, they may arrest without a warrant.

4. Impoundment of arrestee's unsecured automobile and later searches pursuant to the consent of the arrestee including the inventory of its contents is not unreasonable under the Fourth Amendment of the United States Constitution.

5. Where the affidavit for a search warrant contains all the information available from police investigation and sets forth such information including the corroborated reports of a named informant, the determination of a neutral magistrate to issue the warrant is not violative of the Fourth Amendment.

6. Where an affidavit for a search warrant fairly sets forth the grounds for its issuance, and absent a showing of deliberate misleading by the affiant, the determination of a neutral magistrate finding probable cause is not violative of the Fourth Amendment.

7. Where the credible evidence on motions to suppress and at trial show that petitioner was repeatedly warned of his constitutional rights under *Miranda,* and absent a showing of coercion in obtaining exculpatory statements designed to mislead police authorities who are searching for an eight year old girl missing over twenty-four hours, nighttime questioning is not in violation of the Fifth Amendment of the United States Constitution.

8. Where a defendant in custody is warned of his constitutional right to counsel, has the opportunity to speak with his family, travel about the city with police and obtains his car keys from friends, and during that course of time gives police a plausible exculpatory alibi as to the crime concerning which he is being asked questions, and absent a showing of deliberate denial of counsel, there is no violation of the Sixth and Fourteenth Amendments.

9. Where after arraignment on a crime and during the investigatory stages of other crimes, a defendant who is then unrepresented by counsel requests a police officer to talk with him, and after his *Miranda* warnings makes a limited admission, without a request for counsel, there is no violation of the Fifth, Sixth, or Fourteenth Amendments of the United States Constitution.

10. Where a person in custody, properly warned, chooses to participate in oral conversation with a police officer, and makes limited admissions, but later decides not to make a written statement without consulting with a lawyer, there is no violation of the Fifth Amendment with respect to the oral admission.

11. Where a show-up is staged, after arraignment on another crime at which time petitioner is not represented by counsel, and there is no unnecessarily suggestive identification procedure resulting in an in-court identification, there is no violation of the Sixth and Fourteenth Amendments.

STATEMENT OF THE CASE AS TO PRE-TRIAL PUBLICITY

At about 3:30 p.m. on November 20, 1975, Melissa Hinke, age 8, left her mother's home at 2267 West 67th Street to walk to the Lawson's milk store at 6709 Lorain. On the way to that store she was lured into a car by twenty-four year old John Johnson, transported to a remote area of Metropolitan Park, savagely raped, and stabbed and choked to death.

The Missing Persons Unit of the Cleveland Police Department began a city-wide investigation to attempt to find the child, calling in teams from other units to begin a massive search for this missing child. That search and the information police had were transmitted over all available news media in hopes that the lost little girl would be found (E-5). "If you know anything at all about Melissa Hinke's whereabouts, you are asked to call the Cleveland Police."

She was found, two days later, on November 22, 1975, at 10:00 a.m., by Mark Cervan, age 16. Local news media gave reports of the brutality of the crime, police investigation, and grief of Melissa's family. The defense exhibits, stipulated by the State, were the only media coverage that mentioned the Hinke family, Johnson, or anything close to the events of the crime. (Defendant's Exhibits A, B, C, all the venue motion exhibits from newspapers in record.) See chart on the following page.

DAY AND DATE	SUBJECT	A PLAIN DEALER EXHIBITS	B PRESS EXHIBITS	C SUN EXHIBITS	D WKYC (8)	E NEWS (5)	F WJW (3)
Friday 11/21/75	Search	1	1,2			13,14	1,2
Saturday 11/22/75			3,4		,10,11	16	
Sunday 11/23/75	Body found	2			7,8		
Monday 11/24/75	Suspect held	3	5,6,7		5,6	17,18	3,4,5,6,7
Tuesday 11/25/75	Indicted	4,5,6	8,16			1,2	8
Wednesday 11/26/75	Burial	6,7	9		1,2,3,4	22,23,24,25 26,27,28,29,	9,10,11,12,
Thanksgiving Thursday 11/27/75		14,9,11,12	10	1 (Dirty book store)		19,20,21	13,14 16,17
Friday 11/28/75	Arraignment	10			13,14,15,16 17,20,21	3,4,5,6,7,8	
Saturday 11/29/75		12					
		12/7/75 Letter to editor -- Anti Smut	12/5/75 Open Hearts help Mrs. Hinke	12/4/75 Dirty book store	12/18/75 Only 30 people attend auction		

The news media, in this case, was guarded in its treatment of the suspect John Johnson, not using his name until November 25, 1975 (Defendant's Exhibits A-4, B-5), and saying he was not a good suspect, as he was home at 5:00 p.m. (A-3). (B-8) ". . . We do not presume to judge this man's guilt or innocence." Even Johnson's appearance in the media showed signs of tempered restraint. He told reporters on November 28, 1975 (E-4, 5) "Get a good shot but don't run out of film." The last article in the case, December 24, 1975, was an interview with Johnson's friends, calling him a good guy and adding credibility to the rumors that the real kidnapper was still lurking about the area (B-15, B-13).

The news coverage in the event ran within November 21, 1975 to November 29, 1975, followed by small notes holding petitioner in a good light, showing citizens' action, or donations from the Fraternal Order of Police (A-10). The sum total of the public's excitement is demonstrated in Defense Exhibit D-12, December 18, 1975, by the fact that "only 30 people attended the charity auction" held to benefit the victim's family.

On November 28, 1975, in arraignment, John Johnson was to be appointed lawyers. Those lawyers filed motions for discovery on December 5, 1975 and then sat back and waited to see if ninety (speedy trial statute) days would pass. The Court, under a requirement to call a special venire, set the petitioner's trial for February 23, 1976. One hundred jurors were requested of the Clerk on January 27, 1976.

On that day, defense counsel, aware of the trial date, filed a motion to suppress and a motion to voir dire identification witnesses. On February 18th, the Wednesday before trial, petitioner changed his plea to not guilty by reason of insanity, and moved for a continuance to obtain

expert services of a forensic pathologist to examine evidence. As a result of the change of plea, the State moved for a neurological examination of petitioner. The Court, having summoned the venire, overruled the motion for continuance, but made all the State's physical evidence and experts available to defense counsel.

STATEMENT OF THE CASE

On November 20, 1975, at 2:35 p.m., Kimberly Ann Stevens, age 8, walked up to cross an alley at 52nd and Eichorn, and "a car pulled up in front of me and said come here little girl" (R. 645, 1712). The car was a red (R. 651) Buick with a black top (R. 1718, 1719). The driver had a moustache, and black or brown hair (R. 1714) (B-1).

Charles Bozak, bringing empty cases across the street, figured out what he was doing . . . "Well, I seen his arm over the seat motioning to the girl" (R. 1745) . . . "I run in and told my wife. I gave her a license number" (R. 1745) . . . "350184, Ohio" (R. 1749) . . . "Red Buick, clean, like it just came out of a used car lot" (R. 1751) (B-1).

At about 3:00 p.m. only 25 minutes later, Mari Nettgen, age 11, went to Vicki's Candy Store at 51st and Clark after school, ". . . and I came down the alley and a car pulled over and asked me if I knew where 'T.J.' (Thomas Jefferson Junior High) was." (R. 1776). He said, "I will give you a dollar if you show me where 'T.J.' is." (R. 1779). "Red car" (R. 822) . . . "two door, blue tinted glasses, moustache" (R. 814-816, 1781-1784).

At 3:30 p.m., eight year old Melissa Hinke left her home on West 67th Street to walk to the Lawson's Store at the north end of her street. She had three quarters,

some pennies and two quart Pepsi bottles to purchase milk (R. 1830-1836). At the same time, John Mesko saw John Johnson, his friend, at West 67th and Hague, the street immediately south of the Lawson's Store drinking a beer in his 225 Buick, red with a black top (R. 1839).

At 11:00 p.m. on November 20th, Lt. William Thomas Hanton, the First District watch commander, ordered two men to look for a vehicle wanted in the Second District in connection with the attempted abduction of Kimberly Stevens, and possibly involved in the missing person investigation regarding Melissa Hinke (R. 963, 1893). At 12:15, Lt. Hanton responded to West Blvd., looked through the window of the vehicle and saw two Pepsi bottles on the floor of the vehicle, and a bag with a carton of milk. Lt. Hanton and his men went to apartment 1A, knocked and Johnson came to the door (R. 970,1898).

> "We told him we were investigating a complaint and would like to talk to him. He invited us in and went in the bedroom and changed into some clothing."
>
> "We stayed in the front. His wife came out then he came back out." (R. 970).
>
> "I told him we had a complaint and I would like to look at his car, if he would give us permission, and he did." (R. 971, 1899).

Johnson walked out with the police officers and opened the trunk, police looked in, then he opened the car and the police looked in (R. 990). Hanton's information was that Melissa never got to Lawson's (R. 1708), so he left the milk but he took the Pepsi bottles and a towel as the size of the reported bottles could have been an error. In any case, he let Johnson go back to bed and sent the bottles and a towel to S.I.U. (R. 1000), "they were asked of Mr. Johnson, if we could take them." (R. 1902).

At 8:45 a.m., November 21, 1975, General Duty's Marish, Mulhall, and Murphy reported to the mobile command base at 67th and Lorain under the command of Lt. McNamara. They went up and down the streets conducting interviews (R. 1912); they then were assigned to check out the information that had been reported to the Second District concerning the attempted abduction of Kimberly Stevens (R. 1913). They checked Bozak's information and returned to General Duty at about 7:00 p.m. (R. 1914). Melissa Hinke was still missing and police authorities, having followed up over one hundred investigative leads (R. 1241, 2951), corroborated Bozak's information (B-1&2), and found that the towel had semen stains, determined that Johnson should be questioned. At 7:15 p.m. Mulhall and Murphy went out to Mr. Johnson's place of employment (R. 1243, 1358):

> "Do you know why we are here?"
>
> "You are here about the missing girl."

He was placed under arrest, advised of his rights and allowed to call his wife; they waited twenty minutes for a replacement to come out to the station to take over. They left the station about 7:30, had the car towed from the Shell station down the road where Johnson had left it with the key in the ignition (R. 1244, 1246).

On the way down they talked and when they arrived downtown, Johnson was taken to the third floor, Scientific Investigation Unit (R. 1246). Johnson was left with the officer in the polygraph section until 10:30 p.m. At 10:30-10:45, Johnson was returned to the General Duty detectives; he had not passed the lie detector, and was advised of his rights and he was booked at 11:30 p.m. This is the first time Johnson was "questioned" about Melissa Hinke (R. 928, 1916).

"We spoke to Mr. Johnson on the possibility of someone using his car, possibly it was a mistake in license number, explanation as to why his license number would have been obtained at the scene on Eichorn." (R. 928, 1916-1917).

Johnson's wife showed up at the police headquarters, earlier, and spoke from time to time with Officers Mulhall and Murphy while her husband was up at S.I.U. for the polygraph test; in fact, she herself was fingerprinted for elimination purposes (R. 1273). Mulhall told her as far as he was concerned she should notify a lawyer (R. 1274). Mrs. Johnson talked with Johnson, too, and took his wallet home; she testified around 10:00 p.m. a policeman told her she did not need a lawyer, but no police officer ever told her he would be released if he made a statement (R. 2512).

Johnson gave the police permission to search his car, but they would have to get the trunk key (R. 1247). At 1:15 a.m., Marish, Mulhall and Johnson went to a location in Lakewood; Johnson retrieved his keys and handed them to Mulhall (R. 1275). They all went to the Impound Unit, looked in the car, found nothing, went back to General Duty (R. 1919, 1278).

Johnson was taken to jail, and Marish and Mulhall went home (R. 1921) at 2:30 a.m. They intended to take a written statement and release Johnson in the morning.

Meanwhile, the Homicide Unit learned Johnson had been arrested and at 1:30 a.m. Detectives Koelliker and Leppelmeier were detailed to see Johnson (R. 1129); when they got to the jail, Johnson was not yet there, as he was being processed and fingerprinted at S.I.U.; Koelliker waited until 2:00 a.m. (R. 2161, 2172), saw Johnson, advised him of his rights, accused him of killing Melissa Hinke

(R. 1134), and received an oral explanation from Johnson which exculpated him (R. 2160). Defense counsel were given the police officer's reports for cross-examination purposes (R. 2[illegible]3). Police officers made their written reports of this story, put Johnson back in jail about 4:30 a.m., and the detectives went home (R. 2159). Defense counsel, in their questions, accused Koelliker of telling Johnson's wife he would be released if he made a statement. She denied this empty accusation as did Koelliker (R. 1137, 2512).

At 8:30 a.m., Marish, Murphy and Mulhall took Johnson from the jail, and filled out a "release" slip to release Johnson from custody (R. 953, 1353). Johnson made a written "witness statement" (Appendix B-3) at that time, indicating his whereabouts on November 20, 1975 and his assent to searches of his vehicle.

At 9:30 a.m., while the statement was being made, and unbeknown to Marish, Mulhall and Murphy, the General Duty Captain called in Homicide to take over this case (R. 2313). Homicide Sergeant Comodeca went to Central Police Station and found Johnson was being released from custody; thus, he took charge of the investigation, at 10:00 a.m., November 22, 1975 (R. 1308, 2314), had Johnson rearrested, photographed (B-4), searched his body for marks, and confiscated his clothing, none of which had been done by the General Duty Detectives.

At 11:30 a.m., while Homicide Officers were talking with Johnson, they were informed that Melissa Hinke's body had been found (R. 2314-2315).

On the same morning, at 9:30, Pat Reynolds and officers of S.I.U. inventoried the car, photographed it, and processed it for fingerprints at the impound garage, as a part of their normal processing of impounded cars (R.

1310). They too were called to the scene of Melissa Hinke's body (R. 2225) at 11:00 a.m.

Police officers went to the scene, and returned to Central Police Station (R. 2243) where they met petitioner and waited for his attorney, Mike Tholl, who told them, "No statement today" (R. 1108). On the 22nd, Detective McDonald talked with Johnny Mesko, who had seen Johnson behind Lawson's at 3:30 on November 20, 1975, and then Homicide Detective McDonald went to Metropolitan Park.

On November 22, 1975, the Homicide Unit took complete charge of the investigation. Detective Cudo interviewed Kimberly Stevens, Michael Webb, Darlene Webb, Robert David, and Mrs. Stevens. Kimberly identified Johnson's photo as looking like the man who attempted to pick her up.

Homicide Detective Eugene Volk (R. 1140), working second platoon, presented an affidavit for a search warrant (Exhibit A), and executed a search of the premises of Johnson's home pursuant to the warrant (B-5), in company with S.I.U. officers, including Pat Reynolds who had been to the crime scene (R. 2225, 2243). A photographic record was made of the materials seen at Johnson's home (See State's Exhibits). Bloody shorts, beer cans, Kool cigarettes, Lawson's milk, bloody rags were found there (R. 2249-2255).

On November 23, 1975, Sunday, Homicide followed up, talking with Herbert Corrigan, Harvey McGuire, Anna Yates (R. 2812) and Mary Jones (R. 2088). A written defendant's refusal statement (R. 1357), embodying the "*Miranda* Rights" was taken (B-6). Literally hundreds of investigative leads were followed up (R. 2951). In the next couple of days, arrangements were made for

various victims of other sex crimes to come to Central Police Station on November 28, 1975 (R. 2396, 2317). Diane Lawson picked Johnson's picture and a Rambler automobile (R. 785) which matched the plates 350184, Mulhall had run on the computer (R. 1271) (B-2). Debra Main identified Johnson as accosting her (by photo) (R. 701), Lisa Chambers gave a description, and picked Johnson's picture (R. 858, 832, 1058).

On November 24, 1975, Detective Dan McDonald got a search warrant on the auto which was still being held, and Detective Reynolds executed the warrant, finding three burrs, "tick trefoil, meilbomia nudflora" (R. 2263, 2301).

On November 28, 1975, police officers had various witnesses, including other sex crime victims and Lisa Chambers come to Central Police Station, to view Johnson, and Homicide Officers attended the arraignment where his attorney withdrew and new attorneys were to be appointed (R. 2324).

Sergeant Peter Comodeca and Detective Terpay took Johnson to Central Police Station from County Jail and brought him into a room with a one-way mirror. While they were in the room, various persons were asked to look into the room. Johnson was identified by Lisa Chambers, she said he looked like the man who had accosted her.

Detective Don Ferris was one of the people dispatched to pick up victims that day, and was responsible for bringing Lisa Chambers from Brookpark. When he got to the room, about 11:00 a.m. Johnson said he wanted to talk to him privately (R. 2404). Ferris told him, "John, you know you don't have to talk to me because anything you tell me could be used against you if it ever goes to court." (R. 2405, 1361). Ferris gave him his rights and Johnson

told Ferris a new story. After the oral discussion, Ferris asked if he'd make a written statement and Johnson said not without his attorneys. Ferris asked him to repeat the story in front of Sergeant Comodeca, and Johnson did (R. 1086, 2427, 2407, 1065).

The petitioner was permitted to sit and hear all the motion testimony and he took copious notes as to the testimony of each witness put forward in the motion hearings (R. 1384); he did not have to answer each motion separately. Petitioner's direct examination on the motions was so well prepared that it was not credible. He alleged he had lost sleep, that police (R. 1335) had forced their way into his house and searched his car without his resistence (R. 1338), but without his consent. He said no one told him his rights, or at least he could not remember (R. 1340) anyone giving him his rights; that the police said, they "had to have ignition key" (R. 1345), and he went with them, but alleged it was against his will; that he didn't get any sleep before the detectives questioned him, and that they had questioned him at 4:00 or 6:00 in the morning (R. 1349); that he asked for an attorney (R. 1350); that he was told by Detective Murphy that he would be released if he made a statement (R. 1351); that he was harassed and threatened (R. 1359); and that he voluntarily talked with Ferris, but it was supposed to be off the record.

On cross-examination, the State showed him to be lying, that detectives never needed the ignition keys (R. 1379) as he had quoted them, that he gave permission to the police to search his car (R. 1387). He maintained nobody gave him his rights, until the State began laying the foundation to bring in the tape recordings of the polygraph examination, then he suddenly remembered that his rights had been read to him (R. 1408).

The Court found that petitioner had consented to the search of the auto, that the warrants supporting the November 22nd house search and the seizure and inventory of the vehicle, and seizure of the keys were not unreasonable searches. And, that the seizure of petitioner's clothing in custody was not illegal.

The Court further held that the oral and written admissions of petitioner explaining his whereabouts on November 20, 1975, given to police on November 22, 1975 were made with a knowing and intelligent waiver of petitioner's constitutional rights against self-incrimination. The Court allowed the use of Johnson's oral statement to Ferris, but ruled that the statements made after Johnson told Ferris that he wanted his attorneys present for a written statement should be suppressed.

The Court further held that the testimony of Debra Main and Diane Lawson should not be allowed as similar acts.

REASONS FOR DENYING THE WRIT

1. Absent a showing that pre-trial publicity "utterly corrupted" a defendant's opportunity for a fair trial or a showing from scrupulous voir dire examination that any specifically excludable information is set in the minds of the jurors chosen for the trial, the court need not continue the case or grant a change of venue.

On February 23, 1976, fifty prospective jurors entered the courtroom of Judge Francis Sweeney in response to a summons to serve as jurors in Case No. CR 23071, *State*

of Ohio v. John Johnson. The Court, in order to avoid contaminating the panel with pretrial publicity, had the motions scheduled after jury selection. (See record of events).

The jury selection was carried out within two days. The Court inquired of each juror concerning pretrial publicity. The power of the trial court to grant a change of venue is statutory, *State v. McGehan* (1875), 27 Ohio St. 280. Under Section 2931.29, Ohio Revised Code, ". . . if it appears to the Court of Common Pleas, by affidavit or evidence in open court, that a fair and impartial trial cannot be had in the county where a cause is pending such court shall order the accused tried in another county." The action by the trial judge in a motion for change of venue is final in the absence of an abuse of discretion. *Richards v. State* (1932), 43 Ohio App. 212; *State v. Laskey* (1968), 13 Ohio App. 2d 91.

The examination of the jurors in voir dire affords the best test as to whether prejudice exists within the community against petitioner, and where it appears that opinions as to the guilt of petitioner by those called for examination as prospective jurors are not fixed but would yield readily to evidence, it is not error to overrule an application for a change of venue, *State v. Swiger* (1966), 5 Ohio St. 2d 151. As stated in *State v. Laskey, supra*:

> "It does not necessarily follow that a venireman who has read accounts of a crime in a newspaper disqualifies himself, if he can truthfully say that he will decide the case solely on the evidence and the law given to him in court." Also see *Beck v. Washington* (1961), 369 U.S. 541.

In the case at bar, Judge Sweeney's (the Court's) inquiry begins at page 39 of the record:

"THE COURT: All right, fine. Now, that was on the question of jury service. We will get to another part of this case.

Obviously there has been publicity about this case in the news media. Now, I will ask you questions as to the publicity that you may or might not have had access to in this case.

Now, you are not disqualified just because to read something about it, but we must determine whether or not, you have heard about this case, whether or not you can dismiss what you may have heard or read about the case and determine this case only on the—determine the innocence or guilt of the defendant only on what you hear in this courtroom.

Now, I will be questioning all of you on that subject of publicity of the case prior to coming in here this morning. As I said, the case involves an alleged abduction, rape and murder of the girl, eight years of age, her name being Melissa Hinke. She lived at 2245 West 67th Street, and the alleged date of the homicide was November 20, 1975.

Mr. Knetzko, have you heard or had any exposure to this case before coming in this morning?

JEFFREY KNETZKO: Yes, your Honor. I read about it in the papers.

THE COURT: All right. Do you recall specifically what you read, or is that you read something, you have some general knowledge about it and no specifics, what is it?

JEFFREY KNETZKO: General knowledge.

THE COURT: General knowledge of it. Did you express or form any opinions on the subject of that article or articles at the time you read them?

JEFFREY KNETZKO: I believe I had.

THE COURT: You have done that?

JEFFREY KNETZKO: Yes.

THE COURT: All right. Do you feel that what you have read or what you determined from any of the news media that you read or heard would be such that you could not exclude that information from your memory and judge this case solely on what you hear in the courtroom?

JEFFREY KNETZKO: I believe so."

Mr. Knetzko was dismissed for cause.

The Court's voir dire was carried out in front of the whole jury with the Court systematically covering the traditional question of publicity (R. 68), police (R. 70), victim's age and sex (R. 75), violent crimes (R. 76), detectives and prosecutors (R. 78), problems at home and time (R. 79). All these issues were put forward for jurors to excuse themselves if they felt they could not be fair. A good example on how easily the Court released for cause is on pages 396, 387, 384, 414, 411, 406, 327, 326, 42, 50, 52 and 60 of the record.

The seventeen jurors that were dismissed for cause were asked to consider publicity, the nature of the crime or any other reason they could not sit. Their responses are cataloged below, and differ considerably from the characterization in petitioner's Petition as to the issue of pretrial exposure to media and their reasons for wanting off the panel.

Juror	Type of Knowledge or Exposure & Publicity	Reason for Dismissal (paraphrased)
Knetzko	General knowledge (R. 40)	Don't think I could be fair (R. 42)
Hersh	Had read about it (R. 50)	No, I don't think I could (R. 50)
Strickland	Yes, heard about case (R. 51)	No, cannot put aside (R. 52)
Ms. Bungard	General knowledge (R. 56)	I believe I could not sit (R. 56); Called for prior murder trial—prior service would cause problems (R. 57)
Ms. Fletcher	Heard about case	Don't think I could (R. 60)
Ms. Rogers	Heard about this case (R. 47)	Could decide on evidence but have economic hardship, commission salesman
Ms. McGoye	Not very much, but some	Don't think could set aside (R. 326)
Ms. DiLeone	Could not dispell	Could not be fair (R. 327)
Ms. Alderman	Read or heard one item	Would identify with little girl (R. 329)
Ms. Kress		Could not sit
Ms. Rudolph		Could not sit (R. 411)
Berman	No exposure	Do not feel objective, have five year old (R. 414)
Ms. Furman	Vaguely	Testified in molesting case (R. 384)
Ms. Germuska	No media - heard about	Expressed prior opinion (R. 387)
Ms. Bland	Had information	No opinion, had nieces and could not view evidence (R. 396)
Knipper	T.V. and newspapers (R. 527)	No bearing on decision, but had attempted abduction on daughter (R. 531)

Of those dismissed peremptorily the parties clearly indicated that they would put aside any opinions of what the evidence may be and decide the issues under the instructions of the Court based upon in-court evidence.

Juror	
Matuszak	Yes, heard about in media, would follow instruction (R. 62, 284) Fourth year law student State Preempt #1
Dargaj	Could be fair, saw coverage around the time (R. 275, 300) No opinion now Defense Preempt #1
Bailey	Read some, little bit, saw T.V. (R. 63), can judge solely on evidence State Preempt #2
Goodwin	Heard about it, could base upon facts (R. 45, 302) Defense Preempt #2
Walsh	Did not hear very much about it, was in hospital (R. 59, 176) No specific recollection State preempt #3
Greene	Heard about and read about, but would not affect (R. 84) ability to be fair Defense Preempt #3
Joseph	Very vague, no specifics (R. 478), base opinion only on evidence State Preempt #4
Kruger	Very little, just headlines, could set aside (R. 341) Defense Preempt #4
Cummings	Read about, could determine solely on courtroom evidence (R. 67) Defense Preempt #5
Keane	No exposure (R. 304-307) Defense Preempt #6
(Alternate Preemptor)	
Stoll	Read papers, remembered little (R. 571), solely on testimony, Mr. Sperli's client, State Preempt

The speech of Mr. Berkman at (R. 268-274) confused and intimidated potential jurors as the record shows, his specific use of leading questions on Juror Dargaj (R. 274), and Juror Goodwin (R. 278) fashioning his question to look like the words of *Irvin v. Dowd*, 366 U.S. 717 at 728:

> ". . . where eight of twelve jurors had formed an opinion that the defendant was guilty before the trial began, some went 'so far as to say it would take evidence to overcome their belief' in his guilt."

Judge Sweeney, having the opportunity to observe these tactics and the demeanor of the jurors could see that #1 and #2 were no mental match for Mr. Berkman, but juror #3 was (R. 279-281). The court corrected the incorrect

material which Mr. Berkman had attempted to cajole out of the prospective panel. (R. 291-300)

It should be noted that by instruction (R. 68, 142, 245, 342) and sequestration (R. 623), the panel was insulated from any further opinions about the case from news media from 8:00 a.m. on February 23, 1975. Thus they never saw the documentary (R. 1544) referred to in Exhibit (MB 1 & 2), page 22 of petitioner's brief. Each juror was asked if he violated the court's instruction (R. 361-419). The record simply does not bear out the inferences made by petitioner as to the jury being subject to such publicity.

The final jury contained the following fourteen jurors (includes alternates), all of whom were acceptable to petitioner.

*#1 William Nest	Heard very little, formed no opinion, would base solely on courtroom. (R. 330) Defense passed for cause (R. 341)
#2 Robert Anderson	Had some information from the "Press", basically headlines, could determine on the evidence alone (R. 434) No challenge for cause (R. 453)
#3 Emily Morey	Saw in news media (R. 46), would base decision in the courtroom, did not form definite impressions (R. 381) No challenge for cause
#4 Diane Strasshofer	Saw some on television (R. 494), no specifics didn't pay much attention, could serve impartially. Pass for cause (R. 507)
#5 Joseph Brooks	Some pretrial publicity, could set aside and hear the evidence (R. 55). Very, very little, noticed Friday somebody to be tried (R. 286) No challenge for cause.
#6 James O'Connor	Read in newspapers, vaguely remember, no specifics (R. 458), solely on facts. Pass for cause (R. 477)
#7 Leonard Honacki	Very little (R. 528) Television, when it happened, could determine from courtroom. Pass for cause (R. 569)

#8 English Anderson	No, when it first happened, but forgot it, remember nothing specific, "Not a thing" (R. 508) No cross on publication. Pass for cause. (R. 522)
#9 Patrick Nevin	Newspaper and T.V., could judge solely on evidence. (R-64) No cross on publicity. No challenge for cause.
#10 Helen Amos	Just in the media, could set aside and determine on evidence (R. 64) No cross on publicity. No challenge for cause.
#11 Charles Rucker	Heard about generally but could be fair. (R. 65) Didn't keep up, don't read papers (R. 284). No challenge for cause.
#12 Joyce Tanski	Mostly T.V., no specifics, could determine solely on evidence in court (R. 552) Pass for cause (R. 547)
*Juror #1 was replaced	prior to opening statements. (R. 1125)
#13 Albert Compton	T.V., no newspapers, nothing specific (R. 589) Would have no effect (R. 602) "We are satisfied with this juror." (R. 605)
#14 Donald Koshla	Heard about when first happened, would determine solely on evidence in court (R. 605) Pass for cause (R. 622)

And finally, the defense stated "Your Honor, we are well satisfied with the jury." (R. 622).

The Supreme Court decisions on the issue of pretrial publicity are clearly supportive of Judge Sweeney's action in this case, and are reviewed most recently in *Murphy v. Florida*, 421 U.S. 749 (1975). At page 800, the Court noted:

> "We must distinguish between mere familiarity with petitioner or his past and an actual predisposition against him, just as we have in the past distinguished largely factual publicity from that which is invidious or inflammatory. e.g., *Beck v. Washington*, 369 U.S. 541, 556 (1962). To ignore these real differences in the potential for prejudice would not advance the cause of fundamental fairness, but only make impossible the timely prosecution of persons who are well known in the community, whether they be notorious or merely prominent. . .
>
> In the entire voir dire transcript furnished to us, there is only one colloquy on which petitioner can base even a colorable claim of partiality by a juror. In response to a leading and hypothetical question, presupposing a two or three week presentation of evidence against petitioner and his failure to put on any defense, one juror conceded that his prior impression of petitioner would dispose him to convict . . . We cannot attach great significance to this statement, however, in light of the leading nature of counsel's questions and the juror's other testimony indicating that he had no deep impression of petitioner at all." 421 U.S. at 800.

" 'The critical standard which must be met is whether the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.' *Irvin v. Dowd* (1961), 366 U.S. 717, 6 L. Ed. 2d at 756." (See, Journal Entry, p. 4.)

We submit that this critical standard was met in Johnson's case and a fair trial, composed of fair jurors, decided the case based on evidence adduced within the four corners of the courtroom and nowhere else.

The cases relied on by petitioner have no application to this case. Each of them is easily distinguishable in that the trial atmosphere had been utterly corrupted by press coverage. No such situation was present in this case.

As alleged in petitioner's argument, there were two reporters allowed to occupy seats at a table physically located "inside the rail"; no objection was *ever* raised, nor was that issue ever complained of on appeal; only at the very close of the State's case did counsel point it out *for the record* (R. 2467-2470).

In *Irvin v. Dowd, supra,* the defendant, in a rural community, had wide continuous publicity including his confessions to twenty-four burglaries and six murders, and his publicized offer to plead guilty to avoid the possibility of the death sentence. Even in *Irvin,* the Court held:

> "To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. *It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."* Id. at 723, 6 L. Ed. 2d 751, 81 S. Ct. 1639. (Emphasis added).

In *Rideau v. Louisiana,* 373 U.S. 723 (1963), the defendant's twenty minute filmed confession was broadcast on the local T.V. stations.

In *Estes v. Texas,* 381 U.S. 532 (1965), the trial was a "circus atmosphere" due to the intrusion of the press, including T.V. equipment in Court.

The procedure chosen by the trial court assured a fair trial based upon the composition of the jury and voir dire examination as to pretrial publicity and counsel's charge against the trial court on page 24 of his petition is a distortion of the record.

Most recently this Court has passed on the issue of publicity in *Dobbert v. Florida,* 432 U.S. 282 (1977), which reaffirmed the *Murphy* standard in a case factually near the case at bar:

> " 'To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.' Id., at 799-800, 44 L. Ed. 2d 589, 95 S. Ct. 2031, quoting from *Irvin v. Dowd,* 366 U.S. 717, 723, 6 L. Ed. 2d 751, 81 S. Ct. 1639 (1961).
>
> We concluded that the petitioner in Murphy had failed to show that the trial setting was inherently prejudicial or that the jury selection process permitted an inference of actual prejudice. 421 U.S., at 803, 44 L. Ed. 2d 589, 95 S. Ct. 2031." *Dobbert* at 302.

Counsel argues that petitioner's opportunity to have a fair trial in the Common Pleas Court was poisoned by the media, but the record shows that, there were only five days of coverage, from the 25th of November until November 29th, which dealt with Johnson, as the suspect; there were no personal invidious attacks of the type found in *Shepard v. Maxwell,* 384 U.S. 333 (1966), *Riddeau* and *Irvin,* nor was there the circus atmosphere complained of in *Estes.*

The scope and manner of the voir dire is entrusted to the sound discretion of the trial court, *Hambling v. U. S.,* 418 U.S. 87 (1974), *Ristano v. Ross,* 424 U.S. 589, 594, 47 L. Ed. 2d 258 (1976) (see *Voir Dire - Pre-trial Publicity,* 28 A.L.R. Fed. 26), the Court allowed the petitioner to pry into the minds of each juror who sat on the case, and neither the tenor or volume of publicity, or the specific information which reached the jurors who were selected was such as to "utterly corrupt" his opportunity for a fair trial.

A postscript which accurately reports the notoriety of the case appeared in the December 18, 1975 television report—only thirty people attended the charity auction for the Hinke family.

2. Where there is no evidence of threat or coercion in obtaining consent to search an automobile, a consensual police search is not unreasonable under the Fourth and Fifth Amendments of the United States Constitution.

The whole reason for the "exclusionary rule" is to deny the State the use of evidence obtained through conduct of police authority which infringed on the petitioner's constitutional rights, *Wong Sun v. U. S.*, 371 U.S. 471 (1963); *Michigan v. Tucker*, 417 U.S. 433, 41 L. Ed. 2d 182 (1974) at 441. Petitioner argues that the fact that petitioner had been without sleep colored his judgment such that he ought not have consented to allowing police to search his car. In *Bumper v. North Carolina*, 391 U.S. 543, 88 S. Ct. 117 (1968), the petitioner's grandmother gave consent, and thus the rule that the burden is on the prosecutor to prove a waiver. In *Lakewood v. Smith*, 1 Ohio St. 2d 128 (1965), police went to a "Bookie's" apartment and dared him to empty his pockets. He emptied one, but would not empty the other, and the police officer reached in and found betting slips. In the case at bar, police who saw a towel and bottles sitting in open view in the car may well have arrested Johnson and taken him downtown but for the fact of his cooperation. The trial court in the case at bar had to deal with credibility, and found the petitioner's well-schooled testimony, and the later programmed responses of Mrs. Johnson in her testimony, incredible. It is interesting to note the responses of Mrs. Johnson in her testimony in the case-in-chief, such as "sometimes he wouldn't have a scratch on him at all, nothing, . . ." (R. 2481); "make sure there was milk in the house. . ." (R. 2483); her explanation of Johnson's dark glasses (R. 2484) et seq. is particularly indicative of the programmed responses "they were in open view. . ." (R. 2497); ". . . he always made sure there was milk." (R. 2499). Both her testimony

and his totally lacked in credibility. The Court, hearing credible evidence before it, found that Johnson granted police permission to look into his trunk and into his car (R. 1533). Petitioner's statement, he was told that they all "had to go outside to his car", (P. 27 petition) distorts the context of the record (R. 990-992; 971-1335). At (R. 1377): "They asked me if that was my car out front, and I said yes, and they said they wanted me to go out and look at it. I said Okay." A search properly conducted pursuant to a valid consent is constitutionally permissible. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

The Cuyahoga County Appeals Court dealt specifically with the auto search finding no unreasonable search:

> "The first charge in the sequence of events questioned by the appellant objects to the search of the appellant's automobile in the early morning hours of November 21, 1975 without a warrant. We reject this assignment of error because the appellant consented to the search, led the officers to his car without objection, and opened the car doors which he declared to have no operating locks.
>
> The assertion by the appellant that he was responding to an unwarranted show of police force in performing these acts would lead to a legally untenable conclusion. This has been set forth logically and cogently in *People v. Michael* (1955), 45 Cal. 2d 751. There the court said:
>
> 'It is not unreasonable for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes. Such inquiries, although courteously made and not accompanied with any assertion of a right to enter or search or secure answers would permit the criminal to defeat his prosecution by voluntarily revealing all of

the evidence against him and then contending that he acted only in response to an implied assertion of unlawful authority.' *Id.* at 754.

In the circumstances present here, we are unable to discern any evidence of coercion or threat by the interrogating officers at the time of the requested automobile search. Nor was there any evidence of implied threat, coercion or compulsion at any further stage of the proceedings. The conflicting evidence with respect to advice of counsel as well as other *Miranda* rights, *Miranda v. Arizona* (1966), 384 U.S. 436, permitted the trial court considering the motions to determine as a matter of credibility that the appellant had been properly appraised of his constitutional rights by several officers at several times. In fact, when he was initially taken into custody in the early morning hours of November 22, 1975, the appellant himself indicated that he had been so advised. The court, at the conclusion of the appellant's testimony with respect to the lengthy series of motions, addressed him directly as follows:

> 'Mr. Johnson, on the statement you gave on the 22nd of November, was this question asked of you and did you give this answer, "When you were arrested, were you advised of your constitutional rights, and did you understand them?" '
>
> ' "Answer: Yes." '

To this question by the court, the appellant responded:

> 'I don't know whether I gave that answer or not, but if it is there, and I signed it.' (Tr. 1417.)

In addition to this testimony, the appellant was questioned on his statement with respect to the search of his car and home as follows:

> ' "Did you give permission to the detectives of the Cleveland Police Department to search your car and home for any part of the clothing belonging to Melissa Hinke?" '
>
> * * *
>
> 'Yes, I did give permission.' (Tr. 1387.)

These statements, although the appellant sought to question their specificity, remain in the record as strong indications of the effort by the investigating officers to comply with the requirements of *Miranda*.

The important aspect of the evidence as it emerged here is anticipated in *Schneckloth, supra,* at 229:

> 'The problem of reconciling the recognized legitimacy of consent searches with the requirement that they be free from any aspect of official coercion cannot be resolved by any infallible touchstone. To approve such searches without the most careful scrutiny would sanction the possibility of official coercion; to place artificial restrictions upon such searches would jeopardize their basic validity. Just as was true with confessions, the requirement of a "voluntary" consent reflects a fair accommodation of the constitutional requirements involved. In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents. Those searches that are the product of police coercion can thus be filtered out without undermining the continuing validity of consent searches. In sum, there is no reason for us to depart in the area of consent searches, from the traditional definition of "voluntariness." '

The appellant's challenge to the warrantless search of his automobile and the seizure of various items found in the course of the search is therefore overruled."

The police in this case while searching for the missing Melissa Hinke did not arrest Johnson even though his car was identified as the vehicle involved in the attempted abduction at West 52nd & Eichorn. The totality of the facts do not support any showing of force or coercion, thus there is no question before the court of an unreasonable search. Even if this Court would give credibility to the petitioner's acquiescence argument, the Court's analysis in *U. S. v. Watson*, 46 L. Ed. 598, 423 U.S. 411 (1976), 425-426 is dispositive of the issue presented:

> "There was no overt act or threat of force against Watson proved or claimed. There were no promises made to him and no indication of more subtle forms of coercion that might flaw his judgment. He had been arrested and was in custody, but his consent was given while on a public street, not in the confines of the police station. Moreover, the fact of custody alone has never been enough in itself to demonstrate a coerced confession or consent to search. Similarly, under *Schneckloth*, the absence of proof that Watson knew he would withhold his consent, though it may be a factor in the overall judgment, is not to be given controlling significance. There is no indication in this record that Watson was a newcomer to the law, mentally deficient, or unable in the face of a custodial arrest to exercise a free choice. He was given *Miranda* warnings and was further cautioned that the results of the search of his car could be used against him. He persisted in his consent.

> In these circumstances, to hold that illegal coercion is made out from the fact of arrest and the failure to inform the arrestee that he could withhold consent would not be consistent with *Schneckloth* and would distort the voluntariness standard that we reaffirmed in that case."

3. Where police officers have probable cause to believe that petitioner has committed a felony they may arrest without a warrant.

> "The usual rule is that a police officer may arrest without a warrant one believed by the officer upon reasonable cause to have been guilty of a felony. . ." *U. S. v. Watson*, 423 U.S. 411, 417; *Carroll v. U. S.*, 267 U.S. 132; *Henry v. U. S.*, 361 U.S. 98 (1959).

Petitioner says that some evidence was obtained as a result of an illegal arrest. Specifically he complains that police did not have probable cause that a crime was being or had been committed by petitioner.

The Court heard testimony that one hour before Melissa Hinke was taken, petitioner, or someone who looked like him, in his car, attempted the abduction of another little girl within one-half mile of the site of Melissa's disappearance (R. 623); that in his car were two Pepsi bottles and a semen stained towel (R. 979-1000). Melissa Hinke was missing at least forty-eight hours by the time Johnson was arrested. (*State v. Fultz*, 13 Ohio St. 2d 79 (1968).)

The trial and appellate courts felt that police had probable cause to arrest Johnson. But, petitioner argues that the car, keys, and statements ought to be suppressed, comparing this case to *Brown v. Illinois*, 45 L. Ed. 2d 416 (1975). In *Brown* the police arrested the defendant

with *no* probable cause and subsequently presented all their investigative materials to him to coerce a statement. The Supreme Court based its opinion on the finding of the Illinois Court that at the time of his apprehension there was no probable cause (at p. 423):

> "The question of whether a confession is the product of a free will under *Wong Sun* must be answered on the facts of each case."

And, the Court held that the purpose of the exclusionary rule was to remove the incentive to disregard constitutional guarantees (at p. 425). Thus, in the particular facts, the Court held specifically (at p. 42):

> "* * * The arrest, both in design and in execution was investigatory. The detective embarked upon this expedition for evidence in the hope that something might turn up. The manner in which Brown's arrest was effectuated gives the appearance of having been calculated to cause surprise, fright, and confusion.
>
> We emphasize that our holding is a limited one. We decide only that the *Illinois* courts were in error assuming that the *Miranda* warnings by themselves, under *Wong Sun* always purge the taint of an illegal arrest."

None of these methods were used on Johnson. In fact, police asked him to come along voluntarily or be arrested. He chose arrest (R. 1338).

Petitioner severely distorts the record in his recitation of the facts on pages 30, 31, and 32 of his petition. Respondent cannot find in the record the statement alleged by petitioner "that police were not aware of the test results which showed a semen stain at the time of the arrest (2T 258)." On page 959 Marish explained they were told

about the semen but did not have "firsthand" knowledge. Just as he did not have firsthand knowledge of the arrest (R. 932) because he wasn't there. Murphy said that at 5:30 p.m. after checking out the (Bozak) information he checked out all police reports (R. 1241). At 7:00 Murphy, and Mulhall found Johnson at Martin's Oil (R. 1242, 928). Johnson greeted them with "You are here about the missing girl." They talked on the way downtown, and when they got there, Johnson went to the Scientific Unit for polygraph testing, obviously not in the record, as it did not exculpate him (R. 1421, 1246). Murphy went home at 12:30 after seeing Johnson again after his return from the Scientific Investigation Unit at 10:30 or 10:45; Mrs. Johnson was there too, outside the Detective Bureau. Mulhall told her as far as he was concerned, she should notify a lawyer (R. 1274). She even talked with Johnson and took his wallet home.

As stated by the Appellate court:

> "Under the circumstances of the case there was probable cause for the appellant's arrest."

4. Impoundment of an arrestee's unsecured automobile and later searches pursuant to the consent of the arrestee including the inventory of its contents is not unreasonable under the Fourth Amendment of the United States Constitution.

The seizure of petitioner's automobile was not illegal. Petitioner talks about a search, but none occurred until petitioner gave permission. *U. S. v. Watson,* 423 U.S. 411, 413, 425; *Schneckloth v. Bustamonte,* 412 U.S. 218 (R. 1287): "Yes, I did give permission." In the case at bar, the car itself was an instrumentality used in a criminal act, the attempted abduction of Kimberly Stevens, and when seen by an officer, was seizable, even though they may not

have had authority under *Carroll v. U. S.* (1925), 267 U.S. 132, 69 L. Ed. 554, and *Chambers v. Maroney*, 399 U.S. 42, 26 L. Ed. 2d 419 (1970), to pry into hidden places at that moment. *Cardwell v. Lewis*, 41 L. Ed. 2d 325 (1975). With a missing little girl, the State may well have had "exigent circumstances" to search, but since there was merely a seizure, no further justification need be made. To be safe, officers requested consent from Johnson after he returned from the Scientific Investigation Unit (R. 1247). Johnson *lied* that police "had to have the ignition keys" (R. 1345); in fact, he was cooperating with police (R. 1296) and took them to a Lakewood address at 1:00 a.m. in the morning returning at 2:15 when a cursory search was made at the impound lot, followed by inventory and processing by Scientific Officer Reynolds at 9:30 a.m. (R. 1310). He consented to the searches (R. 1302).

The keys were kept in a safe place at the Impound Office, according to police procedures (R. 1300), until the size of the stab wounds on Melissa's body were known, at which time it became apparent that the pen knife could be the weapon (R. 1311).

There is no unreasonable search or seizure where officers come upon evidence in plain view. *Harris v. U. S.*, 390 U.S. 234, 19 L. Ed. 2d 1067 (1968).

5. Where the affidavit for a search warrant contains all the information available from police investigation and sets forth such information including the corroborated reports of a named informant, the determination of a neutral magistrate to issue the warrant is not violative of the Fourth Amendment.

The fact is clear that before the police put Bozak's information in the warrant, it was checked out both with the Stevens family and Bozak, and the information came

from other police officers who had investigated various facets of the event of November 20th, 21st and 22nd. There was no misleading information in the warrant; there was some bad grammar. The case at bar is not a "reliable informant" case. Rather, the police investigative information alleged in the affidavit gives the underlying circumstances. *U. S. v. Ventresca* (1965), 380 U.S. 102.

The affidavit at bar clearly withstands the two-pronged test of *Aguilar v. Texas* (1964), 378 U.S. 108. That test provides that the affidavit must contain some of the underlying circumstances from which (1) the affiant concluded that a crime was being committed, and (2) the affiant concluded that either the informant was credible or his information reliable.

All that is required is that the affidavit set forth facts giving the magistrate reason to believe that the items in question are located in the premises. *Dunbar v. U. S.* (1925), 268 U.S. 435.

The appellate court, on pages 16 and 17 of its opinion, held that it would be straining judicial credibility to hold that the pertinent facts alleged did not justify issuance of the warrant.

6. Where an affidavit for a search warrant fairly sets forth the grounds for its issuance, and absent a showing of deliberate misleading by the affiant, the determination of a neutral magistrate finding probable cause is not violative of the Fourth Amendment.

Affidavits are to be given their common sense meaning and are not to be read hypertechnically. *U. S. v. Ventresca, supra.*

The appeals court found:

"It would be a straining of judicial credulity to hold that the affidavit supporting the warrant alleging (1) the murder of a missing child, (2) the search of an automobile bearing license plates listed to the appellant, (3) the discovery of a towel in the vehicle found to have semen thereon, (4) the discovery of the body of the missing girl in the Cleveland Metropolitan Park North Olmsted area, and (5) the necessity for an early search of the residential premises occupied by the appellant, would not be sufficient to justify a warrant here. The challenge to Mr. Charles Bozak's information, providing the license number of appellant's vehicle in association with an apparently attempted abduction in the nearby vicinity and attacking his credibility as a 'hearsay conclusion' does not accord with the affidavit statement concerning a witnessed attempted abduction.

We, therefore, hold that the warrant issuance requirements of *Aguilar v. Texas* (1964), 378 U.S. 108, have been satisfactorily met. The issuing magistrate who authorized the search warrant may do so on hearsay information provided that he is informed of some of the underlying circumstances on which the informant based his conclusions, and the circumstances from which the officer seeking the warrant determined the validity of the information. We find that these requirements were met in the affidavit executed by the issuing magistrate, and therefore, overruled this objection."

7. Where the credible evidence on motions to suppress and at trial show that the petitioner was repeatedly warned of his constitutional rights under Miranda, and absent a showing of coercion in obtaining exculpatory statements designed to mislead police authorities who are searching for an eight year old girl missing over twenty-four hours, night-time questioning is not in violation of the Fifth Amendment of the United States Constitution.

The *Miranda* rule places on the State the burden to demonstrate that full *Miranda* warnings were communicated to the accused, that he understood these warnings, and that he voluntarily chose to utter incriminating statements while in custody. *Miranda v. Arizona,* 384 U.S. 436 (1966).

The Court stated:

". . . we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right to silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such oportunity

afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." *Miranda v. Arizona, supra,* at 478-479.

The State's burden is to show *Miranda* compliance by a preponderance of the evidence prior to its introduction at trial.

". . . When a confession challenged as involuntary is sought to be used against a criminal defendant at his trial, he is entitled to a reliable and clear-cut determination that the confession was in fact voluntarily rendered. Thus, the prosecution must prove . . . by a *preponderance of the evidence that the confession was voluntary.*" *Lego v. Twomey,* 404 U.S. 477, 489 (1972). (Emphasis added)

In *Michigan v. Tucker,* 417 U.S. 433, 41 L. Ed. 2d 182 (1974), the United States Supreme Court recognized the central concern—where the State's action offended the standards of fundamental fairness under the Due Process Clause, the State was then deprived of the right to use the resulting confession in Court (At 441).

The exercise of the privilege does not bar his later rescinding that prior decision. *Michigan v. Mosely,* 423 U.S. 96 (1975), 46 L. Ed. 313.

From the moment of his contact with Detectives Murphy and Mulhall, Johnson was advised of his rights and at each stage of the proceedings he was readvised (R. 1243, 1408, 1130, 927, 1306, 1120). Johnson was not subject to "incessant interrogation".

The record will show that from the time Johnson was taken to Central Police Station, 8:00 p.m., by general duty officers, until after 10:00-10:30 p.m., he was at the Scientific Investigation Unit for polygraph testing (R. 1343, 1246-47). He talked with his wife (R. 1283), and the detectives, and at 11:30 he was booked into the jail unit. He left shortly thereafter to go get his keys with general duty officers. He was returned to be printed and photographed at the Scientific Investigation Unit (R. 2161), and was released to the jail unit at 2:00-2:30 a.m. Then Homicide Detective Koelliker advised him of his rights and took an oral statement which was exculpatory (R. 2163). Koelliker put him back in his cell about 4:00 a.m. (R. 2139-2177). [Johnson made up a story of yet another interrogation (R. 1347) between 4 a.m. and 6 a.m. (R. 1349).] Petitioner cites the record at 1351 for the time Murphy told him he would be released if he made a statement. A reading of the record will show that he alleged that it was around 6 a.m. (R. 1350). That Murphy or Mulhall took him up and asked him to make a statement and he asked for an attorney. Obviously, the testimony showed Murphy went home before midnight, Mulhall at 2:30. He made up the story of the questioning and the request for counsel (R. 1352, 1248, 1274). Melissa Hinke was still a missing person (R. 2177, 1980, 2316), and the police were searching day and night for any clue, hoping she might be found alive. His stories were consistently exculpatory.

At 8:30 a.m., Johnson was brought down to be released (R. 1308, 1923). The general duty officers were not aware of his oral statement to Detective Koelliker, and they took a written statement, a witness statement, because they believed Johnson to be innocent and were letting him go. (See testimony of Marish, Mulhall, and Murphy, R. 2314, 1353).

Not even petitioner claimed that the statements were involuntary; his only claim was that he could not remember anyone, except the polygraph people explaining his rights. (Petitioner's testimony, R. 1333, 1340, 1408). Defense counsels' allegations that police purposely sought to mislead Johnson as to his need for a lawyer is a misstatement of the record in this case.

The State produced the evidence of Johnson's repeatedly being advised of his rights and his free and voluntary decision to speak at each stage (R. 1243, 1130, 1408, 1916, 2161, 2316, 2405). In the motion testimony, out of the presence of the jury, the Court had to weigh the testimony of petitioner, which was not credible, in determining whether the evidence should be suppressed in trial.

The record reflects that on November 23, 1975, when police returned to the jail and petitioner told them he had a lawyer, no attempt was made to question him until Attorney Mike Tholl talked with him and stated, "No statements today." (R. 2322, 1358). Petitioner's right to remain silent and right to counsel were scrupulously honored.

There is no question as alleged by petitioner that police investigation of the point by point lies of Johnson as to his whereabouts on November 20, 1975 aided in convicting Johnson; just as that same investigation would have exculpated him if he was telling the truth.

As recognized by the appeals court credibility was of prime importance in reviewing this question. There is no factual or legal reason for this Court to substitute its judgment for the lower courts on the issue of credibility.

8. Where a defendant in custody is warned of his constitutional right to counsel, has the opportunity to speak with his family, travel about the city with police and obtains his car keys from friends, and during that course of time gives police a plausible exculpatory alibi as to the crime concerning which he is being asked questions, and absent a showing of deliberate denial of counsel, there is no violation of the Sixth and Fourteenth Amendments.

The facts alleged on pages 52 and 53 of petitioner's petition are not supported by the record. (1) There was no lengthy, continuous, custodial interrogation; (2) Johnson was at the polygraph, not with Marish, Mulhall and Murphy from 7:30 until 10:30 (R. 1246, 1272, 1274); (3) Mrs. Johnson was treated with simple courtesy, not deception (R. 1244, 1273, 1274, 1282); when Marish and Mulhall left him at 2:30, he was *not* a suspect (R. 1294, 1303), and a witness statement was taken for he was being released (R. 1248-49, 1353).

9. Where after arraignment on a crime and during the investigatory stages of other crimes, a defendant who is then unrepresented by counsel requests a police officer to talk with him, and after his Miranda warnings makes a limited admission, without a request for counsel, there is no violation of the Fifth, Sixth, or Fourteenth Amendments of the United States Constitution.

Sergeant Comodeca was never questioned by defense counsel during the motions (R. 1056-1064) about the forty minutes he spent with John Johnson on November 28, 1975. In his cross-examination in the case-in-chief however, he was accused of exhibiting photographs which he denied, and verbal abuse which he denied (R. 2317, 2326).

There is no question that petitioner, after sitting listening to all the witnesses and taking notes, was lying, just like he did to Officers Mulhall and Murphy on November 22, 1975 (See Statement to Murphy, R. 1245), and the Court's ruling on the evidence was proper in motion testimony as the Court had to determine it on the credibility of the witness. Police had scheduled show-ups for the 28th—a Saturday, when the children were out of school—(R. 1060) for sex crimes victims (R. 2317), and when Attorney Mike Tholl quit at the arraignment (R. 2322), police proceeded with their investigation of those sex crimes as well as Melissa Hinke. The "questioning" and show-ups took place between 10:15 a.m., when petitioner was arraigned (R. 2316), and 11:00 a.m., when Detective Ferris came in and Sergeant Comodeca left (R. 2316, 2405).

Petitioner volunteered a statement to Detective Ferris (R. 2405). Even petitioner said Detective Ferris treated him fairly, telling him he did not have to talk at all (R. 1361).

There is no question from the statements both on November 22, 1975 and November 28, 1975 that John Johnson's statements both were "exculpatory" in nature. First, on the 22nd he gave a plausible explanation of his activities on the 20th, evidenced by the way the police treated him; letting him call his wife; getting the manager to the station (R. 1244); allowing for his wife and himself to see each other at 10:30 when she took his wallet (R. 2488); and releasing him from the jail (R. 1248). On the 28th he told Detective Ferris (paraphrased), "I could have, but I have these blackouts." (R. 2405 and following). Neither was a "confession".

There is also no question that Johnson had his constitutional right to the assistance of counsel. The fact is clear, the lawyer quit. The police had procedures scheduled

(R. 2322), and they went about their business (R. 1093). The Supreme Court has recently held in *Michigan v. Mosley*, 46 L. Ed. 2d 313, where after the initial questioning and exercise of his right to counsel petitioner made a separate statement with regard to another crime, the right to police to continue their investigations is not cut off by requesting a lawyer with regard to one of the crimes. The exercise of Johnson's right to counsel was scrupulously honored when police waited for Attorney Mike Tholl on November 23rd (R. 2322), as Johnson said he wanted a lawyer. On the 28th, Johnson got his rights again, having had the assistance of counsel who quit, police spent forty minutes in an *open* room with him during which time victims viewed them (R. 2316). At the end of the forty minutes, Johnson told Detective Ferris (R. 2404), who had just arrived, he wanted to talk to him privately. Are police required to look into Tholl's motivation for quitting, or Johnson's motivation for self-doubt and perhaps remorse? The court has the opportunity to measure the credibility of Johnson and Comodeca and the court clearly found that Johnson's statement to Detective Ferris was voluntary. The appellate court found no abuse of discretion in the trial court's admission of the statements.

The appellate court specifically addressed the issue of voluntariness of consent and applied the United States Supreme Court decision in *Schneckloth v. Bustamonte* (1973), 412 U.S. 218:

> "In determining whether a defendant's will was overcome in a particular case, the court has assessed the totality of all the surrounding circumstances—both the characteristic of the accused and the details of the interrogation."

The evidence clearly showed Johnson to understand what he was doing, in that he was capable of consistently

deceptive stories. He was a mental match for the officers; the stories proved to be a lie.

Counsel has carefully quoted Detective Ferris as saying that "Johnson stated he would not make any statement without his attorney present." (Page 55). A simple reading of Ferris' testimony will show that after his oral admission to Ferris, Johnson said he would not make a *written statement* (R. 1078, 1086) without first talking to the new lawyers the court was going to appoint (R. 2427). The word *statement* was being used as a description of the physical paper produced by a police stenographer (R. 1362), not in the form lawyers interpret that word. That was understood in the trial court.

10. Where a person in custody, properly warned, chooses to participate in oral conversation with a police officer, and makes limited admissions, but later decides not to make a written statement without consulting with a lawyer, there is no violation of the Fifth Amendment with respect to the oral admission.

At Johnson's request Ferris received an oral statement from Johnson after he had expressly warned him of his rights, and at (R. 2405 and 1361):

> "John, you know you don't have to talk to me because anything you tell me could be used against you if it ever goes to court."

After that private interview he told Ferris he would not make a written statement until he talked to his new attorneys.

Petitioner's calculation of time at page 58 of his petition is a continuing pattern of stretching the record. Comodeca entered the room 15 minutes after he left Ferris and Johnson alone. No admission made after his reentry into the room was admitted in evidence.

11. Where a show-up is staged, after arraignment on another crime at which time petitioner is not represented by counsel, and there is no unnecessarily suggestive identification procedure resulting in an in-court identification, there is no violation of the Sixth and Fourteenth Amendments.

Under Ohio Revised Code, Section 2945.59, the legislature has specifically authorized proof of other acts.

The like or other acts which may be shown within the contemplation of the statutes are acts of a character so related to the offense for which petitioner is on trial that they have a logical connection therewith, and may reasonably disclose a motive or purpose for the commission of such offense. *State v. Moore*, 149 Ohio St. 226 (1948).

In the case of the testimony of Kimberly Stevens, such testimony was not an "other act" but was part of the continuous course of conduct of petitioner on November 20, 1975. The other act introduced as a similar act was the attempted abduction of Lisa Chambers on November 14, 1975, as she walked to school. The evidence showed petitioner's mode of attempting to induce little girls into his car, the absence of mistake, intent and motive on his part, or legitimacy of looking for "T.J." with Mari Nettgen.

In each case shown at trial, John Johnson drove his car to an area near a school, and in each case, he attempted to entice a little girl into his car. In each case, petitioner chose the time that children were on their way to or from school (absence of mistake). The similarity of the acts is clear, always little girls and school zones. The jury must necessarily determine the facts from the relevant evidence, and in this case, all the acts are relevant for the purposes enumerated in the statute.

Third grader Kimberly Stevens did not identify John Johnson in Court. She described him with a mustache and dark hair, driving the Buick identified by Bozak (R. 1704-1725, 745-767). Detective Cudo interviewed her on November 22, 1975, and got that description; he showed her one picture; she was not exposed to an identification procedure. Her mother corroborated the time (R. 1731-1741), and getting the information from Bozak to the police. Bozak could not make a positive identification (R. 1754); he could see the man was clean and well-groomed, but couldn't see his face and thought he might have a full beard (R. 1767). One thing for sure, the man driving the red Buick, black top, two door, 350184, Ohio, at 2:45 at 52nd and Eichorn tried to abduct Kimberly. Petitioner had every opportunity to overcome this evidence; coupled with his statement and his continuous possession of the car, proved by Mari Nettgen and John Mesco, there is only one inference that could be drawn from this circumstantial evidence.

On November 14th, Lisa Chambers told her mother about John Johnson attempting to pick her up, and gave her mother a detailed description of the car and the driver (R. 814). She saw a news media picture (R. 856) (NOTE: Press coverage did not depict Johnson with glasses), and told her mother it looked like the man, then her mother kept her away from other news (R. 854). Cudo got her description on November 26, 1975 (R. 2180). Ferris went out on November 28, 1975, and displayed six photos (R. 882, 2398, B-8). Johnson's lawyer had quit, and other lawyers, one of whom quit, were to be appointed (R. 1093).

She saw Johnson's picture in the group, and it looked like the man (R. 859). The police took her downtown, and told her to look through the mirror, *with no further instruction* (she did not know the men in the room) (R. 862); the paragraph on pages 59-60 of petitioner's brief

is not supported by the record (837-860). "I didn't know it before" (R. 867, 868-874). "I said I am almost positive it really looked like it, but I couldn't be sure." (R. 1816). No one told her who to pick out (R. 868) (R. 1817). Her mother, Betty Harry, corroborated the things that happened. "All she said was that she was almost positive . . . What do you mean? I don't remember them telling us anything about the man." Ferris then took Lisa to the impound unit (R. 885), where Lisa walked directly into the lot and identified Johnson's car (R. 886). Lisa did not make a positive identification, but by direct and circumstantial evidence, unrebutted either in the motion or on direct examination with full notice to defense attorneys and their investigators, there could be but one inference drawn. John Johnson was the man driving the car on November 14, 1975, and he tried to pick up Lisa Chambers by the same method that he had tried to get Mari Nettgen and Kimberly Stevens.

Petitioner maintains that under *U. S. v. Wade,* 388 U.S. 218, 240 (1967), the "unequivocal court room identification" which Lisa never made ought to be *per se* excluded under the authority of *Gilbert v. California,* 388 U.S. 263, 273 (1967), which relies on *Wong Sun v. U. S., supra,* and *Mapp v. Ohio,* 367 U.S. 643 (1961). In *Gilbert,* the Court held that where there is a post indictment lineup, sixteen days after arraignment and appointment of counsel, the State is permitted to show the absence of illegality under *Wade,* except where the illegal lineup is "come at by exploitation of [the primary] illegality." *Gilbert's* thrust, under California Law was that the testimony concerning prior identification would tend to bolster the in-court identification before the jury. In the case at bar, defense counsel brought out the pre-trial attempt at identifying petitioner (R. 1814), attempting to weaken her circumstantial identification of petitioner and his vehicle.

The right to the assistance of counsel has been applied at stages of the prosecution where the denial of a fair trial must invariably result, and the possibility of unfairness inherent in confrontations for identifications have resulted in the *Wade* rule. The record here shows that an eleven year old girl had seen a picture of John Johnson in the paper, and told her mother it looked like the man who attempted to pick her up. Having picked a picture of John Johnson as looking like the man (R. 2398); and having a show-up (R. 2399), where the totality of the circumstances were shown to the Court, and the girl said, "I am almost positive it really looked like it, but I couldn't be sure,"; and (R. 1816) then picked out the car (R. 2400); the question is whether in the totality of the circumstances police conduct in this procedure of non-identification denied petitioner a fair trial which presence of counsel would have cured. *Stovall v. Denno,* 388 U.S. 293, 302 (1967); *State v. Hurt,* 30 Ohio St. 2d 86 (1972).

The Court should note that Ohio Revised Code, Section 2945.55 specifically authorized testimony of previous identification, which was the growing trend among the states at the time of *Gilbert* (Op. Cit. at 272, Footnote 10).

The trial court held that the procedure and testimony offered did not violate due process in the totality of the circumstances (R. 1558), even if the Court would find a taint in the tentative identification of Johnson, her positive identification of his vehicle is competent. The Court was shown that the station house show-up was non-suggestive, and all she remembered was from the day of the incident. *Neil v. Biggers,* 409 U.S. 188 (1972).

CONCLUSION

From the very outset of the case at bar, defense counsel's announced purpose was to try this case in the higher courts (R. 294, 422, 782, 1194, 2467, 2469).

Petitioner never sought the truth of the matter, even in this petition before this Court he has chosen to characterize the record unfairly. In his appendix he chooses to include his "Motion(s) for Reconsideration", before the Court of Appeals of Cuyahoga County and the Ohio Supreme Court as if they carried the significance of the lower court holdings. Even his partial inclusion of the record on Appendix 57A fails to point out that the court waited for petitioner to be brought to the courtroom, then began:

"All right. The Court . . ."

This same art was used by counsel at the trial level waiting until February 18th, with a special venire having been summoned for the 23rd to ask for a continuance, a change of venue, and the entry of a plea of not guilty by reason of insanity.

All this skill of his superior lawyers was directed at one goal, to get this Court to substitute its judgment of the facts for that of the trial judge, jury, and appeals court. Perhaps this Court has the insight to draw out the credibility of eight year old Kimberly Ann Stevens at (R. 645-649):

> "Then I was walking home from school. I was about to cross the alley when a red car pulled up in front of me and said 'Come here little girl,' and motioned a few more times. . .
>
> . . . my shoe was unbuckled, so, I kneeled down and buckled it and, then, the door slammed shut and I ran the other way.
>
> . . . I thought he might be trying to get me."

Or perhaps the court can see her little hand at (R. 667) as she indicated how he beckoned her with his index finger.

The same can be said for Mr. Bozak, the Dairyman, or Mari Nettgen, or Lisa Chambers, or Jerry Marish, Bill Hanton, Murphy, Mulhall, Pete Comodeca, or Don Ferris. Petitioner asks this Court to call them all liars based upon the transcripts of the case.

At trial, the record is clear, the judge gave expansive discovery, wide latitude for cross-examination, and required the State to produce all its substantive witnesses in motion testimony before petitioner rebutted anything.

He got up and lied.

The petitioner in this cause has been given fair treatment from his first contact with "red faced" Bill Hanton who left the Lawson milk in the car and Johnson at his home; to the time of his sentencing. He has had his case tried twice at the trial level on motions and in chief, has had the benefit of highly skilled counsel and psychiatrists to present his defenses and test the State's evidence.

The evidence, the bloody shorts, the car, the admissions and deceptions left no doubt of his guilt.

The record of the case simply does not bear out the questions presented by petitioner, and the respondent respectfully urges this Court to deny the petition for writ of certiorari.

Respectfully submitted,

JOHN T. CORRIGAN, *Prosecuting Attorney of Cuyahoga County, Ohio*

By: JAMES M. CAIN
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
Attorneys for Respondent